



POLICE DEPARTMENT

September 30, 2010

MEMORANDUM FOR: Police Commissioner

Re: Sergeant Jesus Freytes
Tax Registry No. 900839
44 Precinct
Disciplinary Case No. 84189/08

The above-named member of the Department appeared before the Court on March 4, 2010 and June 9, 2010, charged with the following:

1. Said Sergeant Jesus Freytes, assigned to 44th Precinct, while on duty at or about 1900 hours on January 3, 2007, in the vicinity of West 166th Street and University Avenue, Bronx County, did abuse his authority as a member of the New York City Police Department by arresting an individual known to this Department without sufficient lawful basis.

P.G. 203-10, Page 1, Paragraph 4 – ABUSE OF AUTHORITY

The Department was represented by Nancy Lichtenstein, Esq. Department Advocate's Office, and the Respondent was represented by Philip Mellea, Esq.

The Respondent, through his counsel, entered a plea of Not Guilty. A stenographic transcript of the trial record has been prepared and is available for the Police Commissioner's review.

DECISION

The Respondent is found Not Guilty.

SUMMARY OF EVIDENCE PRESENTEDThe Department's Case

The Department called Shon Dutton as a witness

Shon Dutton

[It should be noted that it was initially believed that Dutton was not going to appear at trial and the trial concluded on March 4, 2010 and decision was reserved in this case. It was subsequently learned, however, that there was a miscommunication between the complainant's mother as to when he was required to appear. This case was then reopened on June 9, 2010 for Dutton to appear and testify. It should be further noted that when it was believed that he would not appear this Court accepted in evidence his CCRB interview (Department Exhibit [DX] 1- Tape of interview and DX 2-Transcript of tape). This Court kept those exhibits in evidence after his testimony with the understanding that it would only refer to it if it contradicted his live testimony at trial.]

Dutton testified that he was 16 years old and is currently in the tenth grade at John Levine High School. Dutton stated that he also works at an office job faxing papers and helping around the office. He has been at that position for seven to eight weeks. He stated that he has had additional arrests not including the one stemming from the present charges. There was an arrest for an assault whereupon Dutton was placed on probation for a year. He was arrested again in September 2008, which was in violation of this probation. As a result, Dutton served eight months in a juvenile facility.

On January 3, 2007 at approximately 1900 hours, Dutton stated that he was on his way home with one of his friends. He was 12 or 13 years old. At 165th Street and

University Avenue in the Bronx, a car pulled up and the plainclothes police officers inside yelled in sum and substance, "Go home " Dutton replied, "Suck my dick " Three seconds later, four plainclothes officers exited the vehicle and began chasing Dutton. Once the officers caught Dutton, they "beat [him] up and put him on the floor " Dutton explained that one of the officers hit him in the face and he fell. The officers then brought Dutton to the precinct where he was held for three hours. Dutton's mother came to pick him up from the police station. He said he was not given a summons or a ticket and was not photographed or fingerprinted. One of the officers did ask for Dutton's name.

During cross-examination, Dutton said he was not sure if he was 12 or 13 years old at the time of the incident. He acknowledged that he had been arrested twice since the incident. The first arrest was for an assault for which he received probation. Dutton admitted that the second arrest was for a robbery where he and another individual had used a knife or screwdriver to take a cell phone from another person. Dutton admitted that since his arrests, he has learned what is right and wrong. He acknowledged that when he was arrested he knew what was right and wrong as well, but he was young and not thinking.

Dutton stated that he did not know that those individuals in the car were plainclothes police officers. He said that he did not see any shields and that the car was "a regular car ". Dutton stated that there were four or five people in the car. The officers asked him and his friend where they were going. His friend told them they were going home. One of the officers said, "Y'all better get the fuck home ". Dutton said he then replied, "Suck my dick ". He acknowledged that when they got out of the car three

seconds later, he started to run home. Dutton explained that they exited the car in such a way that they were going to start running after him. Dutton said he was chased for about ten to fifteen seconds. He could not remember if one of the officers made fun of the way he walked before he was chased, however, he did recall that the officers made some remarks before he said "suck my dick." At the time, because he was young, Dutton did not think it was disrespectful to say what he had said to the officers.

Dutton disputed the fact that he ran into the Respondent. He explained that two officers were running behind him and another two were running alongside him. He said one of the officers then hit him causing him to fall. He said he did not fight with the Respondent while he was on the ground because there were too many officers. Dutton acknowledged that he was yelling and screaming. He was screaming because he was getting punched in the face and that when they were putting handcuffs on him, they put his hand all the way back. Dutton said that the only other person around was his friend.

Dutton acknowledged that he was now working for the Children Link located at 149 Third Avenue and that he was in the tenth grade. He agreed that he's been "all right" and has not been arrested again. Dutton acknowledged that he was suing the Respondent for half a million dollars. He acknowledged signing some paperwork with respect to that. He admitted he has seen a psychiatrist about the incident. He explained that his mother took him to the hospital after he told her he had been having trouble thinking because he was thinking about the incident a lot. Dutton spoke to other members of the service (MOS) at the hospital.

Dutton admitted that in May 2009, he was picked up for criminal trespass around his block by the police. He stated that the case was dismissed. He explained that his

friend and he were at a bus yard that was owned by the friend's father, but the father was not around when the police found them

Dutton acknowledged that in October 2009, he was stabbed a number of times because some individuals were trying to steal his coat. He admitted that he cooperated with the police the best that he could. Dutton said that he lived in an area where a lot of drugs are being sold.

Dutton could not remember talking with the Civilian Complaint Review Board (CCRB). He remembered speaking to someone at his lawyer's office, but could not remember if it was Investigator Hartman. Furthermore, Dutton could not remember what he talked about, but did say it was audio recorded. DX 1 is the tape of Dutton's CCRB interview conducted in 2007 by Investigator Hartman (the transcript is admitted as DX 1A). Dutton did not remember the following from the interview:

Inv. Hartman: They just asked for your phone number? Had they ever learn your name?

Dutton: Um, I don't think so.

Dutton said that he was scared when he was at the precinct and was not thinking as a result. He stated he was asked one question, but could not remember what that question was. He declared that he did not talk to any of the officers other than to give his mother's name and phone number. Dutton acknowledged that he could identify the person that stopped him that day and pointed out the Respondent as that individual. Dutton said that the Respondent and another officer beat him up with their hands. Dutton was also kicked in the face by someone causing his face to bleed. He acknowledged that he went to [REDACTED] Hospital in the Bronx. At the hospital, he was told that it was a good thing he came because there was a lot of swelling and x-rays had to be taken to see if there were any broken bones. Dutton said the x-rays indicated that nothing was

broken whereupon he was allowed to go home Dutton acknowledged that the CCRB interview occurred after his hospital visit

Dutton disputed the fact that two of his friends left as soon as the police officers chased him He agreed that he had made many allegations to the CCRB, one being force and another being that he got hurt The CCRB did substantiate the force allegation Dutton said that the last time he spoke with his attorney about the incident was in 2008 Dutton spoke with his mother prior to his present testimony However, he did not discuss his testimony in any way with her He stated that his mother said, "There's nothing to talk about The truth is the truth, so say what you got to say"

During re-direct examination, Dutton said he was living at the same address as he currently lives which is [REDACTED] [REDACTED] and [REDACTED] in [REDACTED] He has lived there for approximately eight or nine years Dutton was nine or ten years old when he moved there He said he had a lot of family that lived in the area He spends most of his time in the park with them Dutton testified that shootings and robberies occur in his neighborhood, but he has not witnessed any

The Respondent's Case

The Respondent called Police Officer Alan Avella as a witness and testified in his own behalf

Police Officer Alan Avella

Avella has been a member of the Department for over five years He stated that on January 3, 2007, he was working in the 44 Precinct on a "six to two" tour in plain clothes His supervisor that day was the Respondent Avella testified that a time came

when he was in the area of West 166th Street and University Avenue during his tour. He said that they were doing anti-crime patrol and were slowly traveling northbound in an unmarked car. Avella described the area as crime prone, which was a robbery location at one point. While on patrol, they saw a group of individuals hanging out on University Avenue and 166th Street. They approached the group with their car, but one individual walked off to the side holding the right side of his waistband. The officers attempted to stop the individual and identified themselves as police officers. The individual yelled, "Fuck you. You'll never catch me" and then proceeded to run south. Avella believed that among other things that were said, the individual, Dutton, had also said, "suck my dick."

The officers gave chase whereupon Dutton ended up running directly into the Respondent. They went to the ground and Dutton continued to yell and scream. Dutton was also flailing his arms and legs. Avella said that people in the area came out and were standing in the sidewalk watching them. Avella said the police officers were yelling at him to "stop resisting, stop fighting us" and tried to handcuff him. Avella stated there was a bit of a struggle, but Dutton was handcuffed. During the arrest, a crowd began to form to see what was going on. Dutton was then put into a police car and removed to the precinct with Avella, the Respondent, and two other officers.

At the precinct, Dutton's pedigree information was taken: name, date of birth, address. A notification was made to his mother because he was a juvenile. Dutton was separated from the adults and put in a juvenile room. A Juvenile Report was also completed for Dutton which was then forwarded to a youth officer after a supervisor signs

it The Juvenile Report does not make its way to court, but is an internal document used by the Department as a record

Avella noticed that Dutton had a very slight abrasion on his face from when he collided with the Respondent and fell to the floor Avella did not have an opportunity to speak with Dutton's mother

During cross examination, Avella acknowledged that a crowd gathered while the incident took place He did not know how many people were there, but it was "a good size group " Avella did not know where the people came from and explained that there was a difference between people passing by and observing and a crowd gathering and watching

During cross examination, Avella was shown DX 2 and agreed that he prepared the Juvenile Report for Dutton at the 44 Precinct Avella acknowledged that the Department trained him in filling out paperwork He agreed that the paperwork has to be filled out as accurately as possible and added that he did not write down the Disorderly Conduct statute on DX 2 Avella believed that the subsection for the Disorderly Conduct statute that Dutton was arrested for was Penal Law section 240-22 He did not write anything in the "Summary of Investigation" box in DX 2 because that is for the Youth Officer only

On re-direct examination, Avella said that the subsection for the Disorderly Conduct that Dutton was arrested for involved unreasonable noise in public causing crowds to stop and gather

The Respondent

The Respondent has been a member of the Department for 23 years. The Respondent became a sergeant in 2004. He began working as a sergeant at the 44 Precinct in December 2004.

The Respondent said he was working a 1730 by 0200 tour on January 3, 2007. At about 1900 hours that evening, he was in the vicinity of West 166th Street and University Avenue in the Bronx. The Respondent stated he was driving in an unmarked burgundy Impala going northbound. He was sitting in the front passenger side. The Respondent observed a group of three or four individuals hanging out by the housing project. The Respondent said the area had a problem with cell phone robberies. The vehicle slowed down and the Respondent asked, "Hey guys, what are you guys doing?" They whispered something amongst each other and then Dutton started to walk away holding onto his belt. One of the officers pointed at Dutton saying, "You, stop." Dutton said, "Suck my dick" and ran away. The Respondent said that as Dutton ran south, two officers were at Dutton's side. Dutton then doubled back, crossed the street, and ran towards the Respondent. The Respondent said Dutton did not see him because there was a van. The Respondent stated that Dutton then ran right into his arms. He grabbed Dutton by the jacket and they both fell down. The Respondent fell on top of Dutton. When Dutton fell to the ground, he got up and said, "Oh, I'm sorry. I'm sorry." Then, as a crowd started gathering, Dutton started acting up and that was when the Respondent decided to bring him up on disorderly conduct charges. The Respondent also brought him up on resisting arrest. The Respondent expressed how if Dutton had initially stopped, all that would

have happened was he would have been questioned about what he was doing and then if they would have "cut him loose from right there "

The Respondent declared that when Dutton was put into the car, he became apologetic. Moreover, at the precinct, Dutton told the Respondent "I'm sorry. You know, I shouldn't have done it." The Respondent then explained to him that a lot of things could have happened because when they initially saw Dutton, he was holding his belt like he was carrying a weapon. The Respondent said that Dutton again apologized. Dutton's mother then arrived at the precinct, whereupon Dutton was released. The Respondent said that Dutton had a scrape mark on his face from the fall, a "raspberry." He was not bleeding when he saw him. The Respondent said there was no indication that he needed medical attention. The Respondent declared that this was the first time he had ever dealt with Dutton.

The Respondent said he made a decision to prepare only the Juvenile Report for Dutton. He explained he could have done a Desk Appearance Ticket (DAT) packet, but because Dutton was apologetic, he made the decision to just prepare the Juvenile Report. The Respondent stated that the Juvenile Report is given on to a youth officer, who then reaches out to the juvenile to explain the situation and try to prevent the juvenile from committing bigger crimes in the future. The Respondent also spoke with Dutton's mother, who wanted to make a complaint. The Respondent said he explained to her the entire process and gave her a CCRB form. The mother threw the paperwork and said that she wanted to take her son to the hospital. The mother then left the precinct.

The Respondent testified that no UF-250s [Stop and Frisk Report] were done for the other two friends because they left when the chase initiated. The Respondent stated

that on the Juvenile Reports the actual charge is put down, which would have been Penal Law section 240-20, the Disorderly Conduct charge in this case. At times, some officers put down the actual subdivisions, but it was not necessary here because Avella wrote down Disorderly Conduct and resisting arrest (DX 2). The Respondent said the subsection for Disorderly Conduct that Dutton was arrested for would have been for unreasonable noise and causing a crowd to gather. The Respondent said that Penal Law section 205-30 (resisting arrest) would not be listed in the report.

During cross examination, the Respondent stated that the Juvenile Report is for arrestees under the age of 16 years old. He acknowledged that a Juvenile Report does not require a court appearance. The Respondent explained that the report would go to the Youth Officer who would speak with the juvenile and record that there was some police contact. The Respondent acknowledged that the Juvenile Report was so that if the youth was arrested again, the report would be at the police station. The Respondent said the youth officer also speaks with the officer who wrote the report out and the arresting officer explains what happened to the Youth Officer.

The Respondent acknowledged that he chased Dutton after Dutton said, "Suck my dick." The Respondent said that when he and Dutton fell to the ground, he was able to handcuff one arm, and then someone assisted him in handcuffing the other. The Respondent said the reason they chased Dutton was not just because of what he said, it was also because he was holding onto his belt as if he had a weapon. He could not recall the number of people out in the street at that time. The Respondent remembered being interviewed by CCRB on February 23, 2007. The Respondent recalled saying during his

interview that there could have been people watching at the incident, but he was not really looking for anybody

During re-direct examination, the Respondent said the original reason he was going to stop Dutton was because Dutton started walking away, holding onto his waistband as if he had a weapon. The Respondent testified that they were interested in making sure that Dutton did not have a weapon after he took off running. He said that once Dutton was apprehended, a pat down was conducted. Nothing was revealed during the pat down. The officers also went back to double backed the location where he ran to ensure that Dutton did not dump a weapon.

Upon questioning by the Court, the Respondent said that while people hold onto their beltline all the time, Dutton, upon the officers approaching, turned to favor his right side. The Respondent said that based on his experience, this led him to believe Dutton might be holding a weapon. The Respondent said that he has recovered weapons in 15 to 20 situations where an individual is favoring one side. The Respondent further explained that another technique would be to hug the corner or hug the wall, which again would display a favoring of one side. The Respondent demonstrated the technique by having his arm against the side of his pants and leaning against a wall. The Respondent added that when an individual takes off running, the individual is usually holding onto a weapon or contraband. The Respondent said that in this case, Dutton was only holding on to his baggy pants.

FINDINGS AND ANALYSIS

The Respondent is charged that he abused his authority in that he arrested Dutton without a sufficient legal basis. It should be noted that pursuant to questioning by the Court, it was made clear that Dutton was not arrested. He was taken to the station house because he was behaving in a disorderly manner, but was not officially charged with Disorderly Conduct. Instead, a Juvenile Report was filled out and he was referred to the Youth Officer. He was then released into the custody of his mother.

At the time of the incident Dutton was 12 or 13 years old. At trial, he insisted that he was only with one friend walking home from the park and that friend remained at the scene throughout the incident. It was at that point when a car with four men in "regular clothes" pulled up to them. He also claims to not have seen the officers' shields and did not know they were police officers. He stated that they yelled out to him and his friend to go home. He later testified that the officers told him "y'all better get the fuck home." At that point, Dutton disrespectfully told the officers "Suck my dick." He blamed his disrespectful language on his young age.

According to Dutton, once he made that statement to the officers, they exited the vehicle and ran after him. He stated that he did not run because they were police officers, but, because they were abusing him. He stated that it was four officers who chased him, two of the officers were behind him and another two were on the side of him. He stated that he never ran into the Respondent.

As Dutton was running, he stated that one of the officers hit him and he fell to the ground. While on the ground, he claimed that the officers punched him in the face and kicked him. He described the beating as "they all hit me with their hands. Some kicked

me, others, they was on top of me I know someone kicked me in my face My face was bleeding. I had a big knot on my face ” He said he was yelling and screaming because he was being punched in his face He identified the Respondent as one of the officers who hit him He was then handcuffed and when he was picked up from the ground the only person that he saw was his friend who remained at the scene He was then taken to the station house

In his CCRB interview, Dutton casts considerable doubt on his testimony in that he contradicted what he told this Court as to what occurred during his encounter with police He told CCRB investigators that he was coming from his home and going “to the store and I was with some people I know and I was walking with them and we started sinoking And then just like the officers pull up in plain clothes, in a plain car ” From this statement, he apparently knew from the beginning of this incident that the men in the car were police officers And when they told him and his friends to go home because it was a school night Dutton knew he was telling police officers to “Suck my dick ”(DX 1)

Dutton told investigators, in detail, that when he left his home and on his way to the store he met with the two guys One of them was 18 years old and the other was 17 years old He said the store, he was going to was a 24 hour store with the word “Deli” on it He said he was only with the guys for about “like a minute” when the police stopped their vehicle He said there was a total of 5 officers in the vehicle He noted that the two guys he was with left him there They were already gone when the police started chasing him and were not there when he was driven away by police

He further told CCRB investigators that he ran “almost half a block” before one of the officers lifted him by his “hoodie and then slammed me he lifted me up like

that—fell [forward] on [the lower part of his] face ” He stated that he did not receive any injuries from that encounter, and he could not say which officer lifted him by his hoodie

He further told the investigator that it was when one of the officers kicked him on the right side of his face and then one of them punched him in the head that caused him the injuries During this time, one of the officers was down on the ground with him holding him down by his arms He stated that he was hit in the head “at least five times ” He was then handcuffed and put in the car He stated that when he was in the car “one of them kept hitting me in the face ” In the car, he said there were two officers in the front seat and he was in the rear seat with two officers on one side of him and one on the other

Dutton’s version of the incident becomes even more doubtful and less credible as he continued to tell his story at trial He stated that once at the station house, he insisted that he did not speak to a detective or anyone He said that his mother took him to the hospital and the only time he spoke to the police was at the hospital It was only after he was reminded that he had to tell one of the officers his mother’s name so that she could come and get him that he admitted that he had spoken to police He also claimed that he spoke to someone in his lawyer’s office but could not remember if it was CCRB investigator Hartman Nor could he remember what he told the investigator in the office yet, one only has to review (DX 1) to realize that a substantial record was made of his interview with CCRB ¹

In response to questioning about his filing of a \$500,000 lawsuit for this incident, he claimed that this incident had such a traumatic effect on him that he had to seek treatment from a psychiatrist Yet, he made no mention of any effect that his subsequent arrest for assault, his participation with another person in an armed robbery [one of them

¹ From the context of the interview it is clear that the interview took place in an office on 225 Broadway

had a knife] of a boy for his personal property, the fact the he was stabbed several times when he was a victim of a robbery or when he spent almost a year in a juvenile detention center for parole violation, had on him that required any form of treatment

His story further lacks credibility where he describes the brutal beating he received from the police—being repeatedly punched and kicked about the head and face yet, when he went to the hospital, the only treatment he claims to have received was an x-ray of his head which revealed no broken bones

The Respondent, in contrast, credibly testified that he was in the front passenger seat of an unmarked vehicle patrolling the area of West 166th Street and University Avenue, near a housing project in the Bronx. The area had problems with cell phone robberies and the Respondent and his team was on anti-crime patrol

At one point, the Respondent saw three or four individuals hanging out by the housing project and the Respondent asked “Hey guys, what are you doing?” He saw them saying something to each other and then observed Dutton walk away holding onto his pants. One of the officers told him to stop and Dutton told them “Suck my dick” and he ran away

The Respondent testified that two officers ran after him and were at his side when he doubled back, crossed the street and ran into the Respondent who was standing by a van. The Respondent grabbed Dutton by his jacket and both fell to the ground with the Respondent falling on top of Dutton

The Respondent further explained that, in his experience, when he sees an individual holding on to his pants or favoring his side the way that Dutton did, it leads him to believe that he might be holding a weapon. The Respondent told this Court that

he has recovered weapons in 15 to 20 situations where an individual was favoring one side. He added that when an individual takes off running, as Dutton did, the individual is usually holding onto a weapon or contraband.

The Respondent noted that Dutton had a scrape mark on his face from the fall which he called a "raspberry" and he did not see him bleeding. He also noted that there was no need for medical attention.

The Respondent decided to have Dutton charged with Disorderly Conduct and Resisting Arrest in a Juvenile Report rather than a Desk Appearance ticket because Dutton apologized for his behavior. This Court was informed that a Juvenile report is not an arrest but a form of record keeping on juveniles.

Avella, who was on anti-crime patrol with the Respondent also credibly testified when he told this Court that the area of West 166th Street and University Avenue was a crime prone location known for robbery crimes. He stated that, at one point, he saw a group of individuals and as their car approached them, he saw one individual, Dutton, walk off holding the right side of his waistband. When the officers attempted to stop him, Avella stated that he told the officers "Fuck you. You'll never catch me" and proceeded to run. He also told the officers to "Suck my dick." When the officers gave chase, Dutton ran directly into the Respondent. When the Respondent and Dutton both fell to the ground, Dutton was yelling and flailing his arms and legs. People began to gather and were watching what was taking place. The officers were telling him to stop fighting, stop resisting as they tried to handcuff him. After a struggle, Dutton was handcuffed, put in the vehicle and transported to the station house.

At the station house, in contrast to Dutton's testimony that he did not speak to any detective, his pedigree information was taken—name, date of birth and address. A notification was made to his mother, because he was a juvenile and a Juvenile Report was prepared.

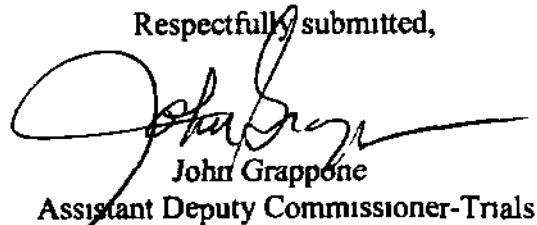
The only injury that Avila noticed on Dutton was a slight abrasion on his face from when he collided with the Respondent and fell to the floor.

In the opinion of this Court, the Respondent and the officers with him were on anti-crime patrol in an effort to protect the citizens in the area of West 166th Street and University Avenue from the rash of crime that was taking place there. When he came upon Dutton, who was acting in a manner consistent with someone carrying a weapon, the Respondent, based on his experience, believed he needed to speak to Dutton to insure that he in fact was not carrying a weapon.

Dutton cursed the officers and ran still holding his pants indicating that he might possibly have a weapon. He ultimately ran into the Respondent and was taken into custody for Disorderly Conduct when his yelling and screaming caused a crowd to gather. The evidence indicates that the Respondent was doing his job and the only injury that Dutton apparently received was a slight abrasion that he received when he ran into the Respondent.

Based on the foregoing the Respondent is found Not Guilty as charged.

Respectfully submitted,


John Grappone
Assistant Deputy Commissioner-Trials

APPROVED

MAR 22 2011
RAYMOND W. KELLY
POLICE COMMISSIONER